Supreme Court
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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

October Term, 1951.

No. 463.

SUNBEAM CORPORATION,
Petitioner,

v.

CIVIL SERVICE EMPLOYEES COOPERATIVE ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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facturer's representatives, are such transactions within the scope of interstate commerce and subject to the restrictive provisions of the Sherman Act as amended?

2. Are the issues in this case determined by the decisions of this Court in *Schwegmann Brothers v. Calvert Distillers Corp.* and *Sunbeam Corporation v. S. A. Wentling,* holding minimum resale price fixing agreements unenforceable against "non-signers".

STATUTES INVOLVED.

Miller-Tydings amendment to the Sherman Act, 50 Stat. 693; 15 U. S. C. A. #1.

Pennsylvania Fair Trade Act, June 5, 1935, P. L. 266, as amended by the Act of June 12, 1941, P. L. 128; 73 Purdon Pennsylvania Statutes, Sec. 7-8.

STATEMENT OF THE CASE.

The petitioner at page 2 summarizes the relevant facts in the case but understates the nationwide scope of petitioner's activities.

Sunbeam products are nationally advertised and distributed to wholesalers and retailers throughout the nation under the supervision of petitioner's representatives. Its price fixing activities are nationwide.

The Court of Appeals stated in its final decision that it was the interstate character of Sunbeam's commerce that is crucial not merely its nationwide price fixing scheme.

ARGUMENT.

Petitioner Is Not Entitled to Injunctive Relief Under the "Non-Signer" Clause of the Pennsylvania Fair Trade Act Where the Scope of Its Activities Are Nationwide and Interstate Commerce Is Involved.

The history of the development of minimum resale price fixing agreements within the scope of so-called Fair Trade Acts enacted by the legislatures of most of the states as well as the enactment of the Miller-Tydings amendment to the Sherman Act is well known to this Court.

There is no valid basis for distinguishing the facts or the issues in the present case from the facts and issues presented to this Court in the cases of *Schwegmann Bros. v. Calvert Distillers Corp.*, reported in 341 U. S. 384; and *Sunbeam Corporation v. S. A. Wentling,* reported in 341 U. S. 944.

The argument of petitioner that the decision in the *Schwegmann* case does not apply to its activities because they are intrastate only was also advanced when the *Schwegmann* case was before the Court of Appeals for the fifth circuit, and the issue was, therefore, before this Court.

The issues in both cases are identical in that the products were manufactured out of the state, Sunbeam products in Illinois and Calvert-Seagram products in New York, and were shipped into the state and distributed through distributors, wholesalers and retailers within the state. Both companies maintained a national organization, participated in nationwide advertising, supervised the distribution of its products in the various states, and supervised and promoted the enforcement of its minimum resale price maintenance scheme throughout the nation from its home office.

In the *Schwegmann* case, the manufacturers took the position that the sales sought to be enjoined were wholly intra-state sales and, therefore, beyond the scope of the Sherman Act. They admitted that they operate on a nationwide scope and functioned in interstate commerce.

vania Act whether or not the defendant is a party to a Fair Trade contract.

The milk control laws of the various states are based on the police power of the states. Likewise, the Pennsylvania Fair Trade Act and the similar statutes adopted in forty-four other states are based on the police power of those states.

The Preamble of the Pennsylvania Act clearly states that it is to protect trademark owners, distributors, and the public against injuries and uneconomic practices. This is exactly the same object, the protection of which was sought by the New York milk control law referred to in the Nebbia case and in the similar laws now in force in many states.

There is no reason why the Commonwealth of Pennsylvania should be denied the right to control destructive merchandising practices in department store merchandise than there is for denying it the right to control destructive practices in the milk trade.

VI. CONCLUSION

It is respectfully submitted that the Court of Appeals was mistaken in believing that the Schwegmann case controlled this case. It is further submitted that considered independently the decision of the District Court should be affirmed and the Petition should be granted for the reasons above set forth.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,344

SUNBEAM CORPORATION
v.
CIVIL SERVICE EMPLOYEES' CO-OPERATIVE ASSOCIATION,
Appellant

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Reargued October 15, 1951
Before MARIS, GOODRICH and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 1, 1951)

By GOODRICH, *Circuit Judge*

This case, like the companion litigation in Sunbeam Corporation v. S. A. Wentling, (opinion filed herewith), makes its second appearance in this Court following the Supreme Court decision in

Schwegmann Brothers v. Calvert Distiller's Corp., 341 U.S. 384 (1951). Our earlier decision is reported in 187 F. 2d 768.

We need not repeat here what was said in the earlier discussion nor what has been said in the companion case to which reference has just been made. The only new point we have in this case, that Sunbeam urges strongly, is that the defendant association conducts only local business and, therefore, its sales are all intra-state. Since they are intra-state, the argument runs, Congressional action or inaction has nothing to do with the situation and the state fair trade law controls. Since the state fair trade law imposes the obligation to maintain prices upon non-signers as well as upon signers, the defendant association must, therefore, be enjoined from violating the state law. It is argued that even if goods come from without the state, when they have come to rest here they are no longer in interstate commerce and are, therefore, subject to the state law in every respect. Many decisions are cited to this effect including our well-known friend, Schechter Corp. v. United States, 295 U. S. 495 (1935).

One of the troubles with this argument is that it is directly contrary to the result reached by the Supreme Court in Schwegmann Brothers v. Calvert Distiller's Corp. There the whiskey was man-

ufactured in Maryland and was sent to distributors in Louisiana. These distributors sold some of it to retailers in Louisiana among whom were Schwegmann Brothers. They sold the liquor in their store to local buyers. Where the consumption took place we do not know but at any rate the local retail sales were in Louisiana. Those are the same facts as found in the present case. If the fair trade acts do not help Calvert to maintain the retail prices on whiskey in over-the-counter sales in Louisiana, they certainly cannot help Sunbeam to maintain the price of razors in over-the-counter sales in Philadelphia.[1]

The reason is clear. It is the interstate character of Sunbeam's commerce that is crucial and governing for it is Sunbeam's price fixing scheme which constitutes a trade restraint. This is the plan Sunbeam seeks to make nationwide by enforcing the non-signer provisions of local law in each of the states where a fair trade act has been established. This marketing plan is quite similar to the one struck down by the Supreme Court in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373 (1911), where the pressure was applied against local stores making local sales.

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1. In all material respects, the Louisiana statute involved in the Schwegmann case is similar to the Pennsylvania statute involved here. See La. Gen. Stat., §§ 9809.1 *et seq.*, and Act of June 5, 1935, P. L. 266, §§ 1-5, as amended, 73 Purdon's Pa. Stats. Ann. §§ 7-10.

The judgment of the District Court is reversed and the case remanded with direction to enter judgment for the defendant.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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CIVIL SERVICE EMPLOYEES COOPERATIVE ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The Opinion of the Court of Appeals reversing the judgment of the District Court and remanding the case with direction to enter judgment for the respondent is not yet reported, but is printed as an appendix to the Petition for Writ of Certiorari.

JURISDICTION.

The jurisdictional requisites are adequately set forth at page 3 of the Petition.

QUESTIONS PRESENTED.

1. Where the products of a manufacturer are nationally advertised and distributed nationally through wholesalers and retailers, under the supervision of the manu-

The Court of Appeals in an Opinion by Chief Judge Hutcheson disposed of this contention as follows (page 13):

> "We agree with appellants that though the sales made by appellants were made intrastate the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of Congress over it as to bring plaintiffs' activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them."

The decision was reversed on the question of whether the Miller-Tydings Amendment removed the Sherman Act restrictions on price maintenance contracts which are valid according to the law of a state and binding alike upon signers and non-signers.

In the case of *Sunbeam Corporation v. S. A. Wentling,* reported in 341 U. S. 944, this Court in a per curiam opinion granted the petition of the defendant for certiorari, vacated the judgment of the Court of Appeals for the third circuit and remanded the case for reconsideration in the light of *Schwegmann Brothers v. Calvert Distillers Corp.*

This case was reargued before the Court of Appeals on October 15, 1951, following which the Court filed an Opinion on November 1, 1951, reversing the judgment of the District Court. This decision has not been reported and a copy thereof is attached to this brief as an Appendix.

Both of these *Sunbeam Corporation* cases were before the Court of Appeals for the third circuit and involved enforcement of the Pennsylvania Fair Trade Act against non-signers. The *Wentling* case originated in the United States District Court at Harrisburg and the *Civil Service Employees Co-op* case in the United States District Court at Philadelphia.

In both cases Sunbeam Corp. was awarded an injunction in the lower court, which was affirmed by the Court of Appeals and subsequently reargued and reversed following the decision of this Court in the *Schwegmann* and the *Sunbeam-Wentling* cases.

Petitioner next contends that sales of its products below the established minimum resale prices causes damage to its valuable trade-mark rights and should for that reason be prevented by law. This argument was advanced by this petitioner in the Court of Appeals upon reargument in the *Sunbeam-Wentling* case and is answered by Judge Goodrich at page 3 of the Opinion. (See Appendix.)

> "It would indeed be a remarkable result to reach in a competitive economy if we were to say that a manufacturer could make everyone submit to the price he imposes upon sales to the consumer. Even a contract to maintain prices was unlawful prior to the Millard-Tydings amendment to the Sherman Act as the famous Dr. Miles and Hartman decisions show. To the extent that a manufacturer can get the same result without contract because of some theory of trade-mark protection, competition at the retail level in the sale of trade-marked goods is obviously going to be very much lessened."

Petitioner's final argument is that all distributors and dealers in fair trade states who will be supplied in the future will be bound by express contracts which are binding and if respondent ever secures any more Sunbeam articles, it can get them only from or through someone who violates an express contract with the Sunbeam Corporation (Petitioner's Brief pp. 19-20).

Petitioner upon reargument before the Court of Appeals stated in its brief that since the decision in the *Schwegmann* case had been handed down it had procured in excess of 80,000 signed minimum resale price agreements from dealers in Sunbeam products.

Petitioner in the belief that it has found a loophole in the *Schwegmann* decision has conspired with its distributors and wholesalers to refuse Sunbeam products to any retailer unless that dealer also sign a similar agreement.

It is a well known fact in the Philadelphia marketing area that a dealer is now coerced and forced into signing

a so-called Fair Trade agreement in order to obtain Sunbeam products and it is obvious that this illegal marketing scheme will be the subject of further litigation.

In the case of *Kiefer-Steward Co. v. Joseph Seagram & Sons,* reported in 340 U. S. 211, this Court stated at page 213:

> "We reaffirm what we said in United States vs. Socony-Vacuum Oil Co., 310 U. S. 150, 223: 'Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.'"

CONCLUSION.

The Court of Appeals for the third circuit has properly disposed of the issues involved in this case in the light of *Schwegmann Brothers v. Calvert Distillers Corporation* and the petition for certiorari should be denied.

Respectfully submitted,

DELBERT T. KIRK,
Attorney for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,280

Sunbeam Corporation

v.

S. A. Wentling,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Reargued October 15, 1951

Before MARIS, GOODRICH and KALODNER, *Circuit Judges.*

OPINION OF THE COURT
(Filed November 1, 1951)

By GOODRICH, *Circuit Judge*

This case is before us for the second time. It was previously reported in 185 F. 2d 903 and the opinion there gives the background of the case. It is here again because of the Supreme Court decision in Schwegmann Brothers v. Calvert Distiller's Corp., 341 U. S. 384 (1951). That decision held that a retailer who did not sign a contract for price maintenance is not to be subjected to the schedule of a price maintenance plan. In our former decision we denied Sunbeam protection against Wentling in interstate sales but did affirm the granting of the injunction against intra-state sales at less than the price Sunbeam had fixed.

It is now clear in view of the Supreme Court decision that even when we cut down the protection Sunbeam wanted we still gave it more than it should have had. The Supreme Court's conclusion is perfectly clear. One who does not sign a price maintenance contract cannot be subjected to the non-signer provisions of a state fair trade law where interstate commerce is involved. So it would seem, then, that Sunbeam is entitled to no protection at all against Wentling, a non-signer.

But Sunbeam comes into court upon rehearing with a second string to its bow. It says that it has valuable trade-mark rights in its razors. It sells these razors through retailers a large number of whom have signed price maintenance contracts. These retailers have to spend a large percentage of their gross receipts in selling costs. If merchandise is sold at a lower price than these retailers can afford to sell they cannot compete successfully against the price cutters and will turn to someone else's razors instead of selling Sunbeam Shave-masters. This is an injury, it is argued, to Sunbeam's trade-mark and should be prevented by law.

The consequences of accepting the argument almost take one's breath away. It is perfectly true that a trade-mark is entitled to protection. Nor does it require any fair trade act to give such protection.

For instance, if Wentling sold his own or someone else's razors as those of Sunbeam he would be in trouble. One of the best established forms for relief against unfair competition is that given against one palming off his goods as those of another.[1] But Wentling does not sell Sunbeam's razor's as Wentling's; he sells Sunbeam's razors as Sunbeam's.[2] There is no deception or palming off. Sunbeam says that if Wentling wants to sell its razors below the established price he should take off the identifying trade-

1 See Restatement of Torts, §§ 712, 717.

2 Which, according to the RESTATEMENT OF TORTS, § 736, he has an affirmative right to do.

mark. Suppose he did. He certainly could not put on his own mark and sell Sunbeam razors as his, Wentling's. And if he sold them with no mark at all but just as "good electric razors" could not Sunbeam, on the very argument it makes here, complain that Wentling was interfering with its trade-mark by not allowing the customer to know that the good razor which he buys from Wentling is in fact made by Sunbeam? If Sunbeam's argument made to us is sound, we do not see why the other conclusion would not follow. Yet this is the very thing which the Supreme Court, and others, have said Wentling could do.[3]

It would, indeed, be a remarkable result to reach in a competitive economy if we were to say that a manufacturer could make everyone submit to the price he imposes upon sales to the consumer. Even a contract to maintain prices was unlawful prior to the Millard-Tydings amendment to the Sherman Act as the famous Dr. Miles and Hartman decisions show.[4] To the extent that a manufacturer can get the same result without contract because of some theory of trade-mark protection, competition at the retail level in the sale of trade-marked goods is obviously going to be very much lessened.

A patentee is given a monopoly by legal grant. But even a patentee, who can exclude everyone else from making his patented article, cannot control the price at which others

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3 *See*, Old Dearborn Co. v. Seagram Corp., 299 U.S. 183, 195, "Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases."
The Supreme Court has also held that one may use the manufacturer's trade-mark when he repacks and resells the trade-marked goods so long as he does not deceive the public thereby. Prestonettes, Inc. v. Coty, 264 U.S. 359 (1924). One may also use the trade-mark on the goods when they are sold second hand so long as he indicates clearly that they are "used" products. Champion Spark Plug Co. v. Sanders, etc., 331 U. S. 125 (1947). Moreover, one may buy trade-marked goods and use them in the manufacture of new products which may be advertised to show the use of trade-marked materials in them. Forstmann Woolen Co. v. J. W. Mays Co., 71 F. Supp. 459 (E.D.N.Y. 1947) and 89 F. Supp. 964 (E.D.N.Y. 1950). See also Restatement of Torts, §§ 736, 737.

4 Dr. Miles Medical Company v. John D. Park & Sons Company, 220 U.S. 373 (1911); John D. Park & Sons v. Hartman, 153 Fed. 24 (6th Cir. 1907).

may sell his articles to consumers.[5] The protection given to the owner of a trade-mark certainly should not be greater than that given to the holder of a legal monopoly, the patentee.

Our conclusion here is free from doubt. Sunbeam's rights under the fair trade act against a non-signer are shown by the decision in the Schwegmann case. There are no such rights. Sunbeam's rights against Wentling based on the common law of trade-mark protection are certainly to be recognized but they do not go so far as Sunbeam urges here. The injunction against Wentling must be dissolved.

Wentling put in a counter-claim in the trial court when this case was brought up. That counter-claim was dismissed without consideration because of the position taken with regard to Sunbeam's rights under the fair trade acts. The counter-claim is to be restored and Wentling given an opportunity to make what proof he can under it. We do not pass in any way upon the merits of his counter-claim.

The judgment of the District Court is reversed and the case remanded for further proceedings consistent with this opinion.

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5 See Bauer v. O'Donnell, 229 U.S. 1 (1913); Straus, *etc.*, R. H. Macy & Co. v. Victor Talking Machine Co., 243 U. S. 490 (1917); United States v. Univis Lens Co., Inc., 316 U. S. 241 (1942). A patentee may, however, fix by contract the price at which his licensees may sell the patented article. See Bement v. National Harrow Co., 186 U. S. 70 (1902) and United States v. General Electric Co., 272 U. S. 476 (1926).